Turnpike Synergy Sdn Bhd v KAY Corp Sdn Bhd and another application

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NOS BA-24C-41–05 OF 2023 AND BA-24C-61–08 OF 2023
SUMATHI MURUGIAH JC
18 JANUARY 2024

Building and Construction Law — Construction Industry Payment and Adjudication Act 2012 ('CIPAA') — Payment dispute — Defendant commenced adjudication proceedings against plaintiff — Adjudicator decided in favour of defendant — Plaintiff applied for setting aside and stay of adjudication decision ('AD') — Defendant applied for enforcement of AD — Whether application to set aside AD pursuant to s 15 of CIPAA should be allowed — Whether application for stay of execution of AD pursuant s 16 of the CIPAA should be allowed — Whether application to enforce AD pursuant to s 28 of the CIPAA should be allowed — Construction Industry Payment and Adjudication Act 2012 ss 15, 16 & 28

Turnpike Sdn Bhd ('Turnpike') had appointed Kay Corp Sdn Bhd ('Kay Corp') as the main contractor for a project. Kay Corp was engaged by Turnpike to carry out a specific scope of work in relation to the project. The scope of works was then expanded to include variation works. The certificate of practical completion was issued and Kay Corp served a payment claim for the sum of RM17,202,421.33. Turnpike had disputed the amount claimed by Kay Corp. Due to the non-payment claim, Kay Corp had commenced adjudication proceedings pursuant to the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') against Turnpike. The adjudicator decided in favour of the Kay Corp in his adjudication decision ('AD'). As a result of the AD, the followings were filed by the parties: (a) Suit 41 filed by Turnpike against Kay Corp to set aside the AD and via this originating summons, Turnpike had filed for a stay of execution of the AD; and (b) Suit 61 filed by Kay Corp for a court order to enforce the AD. Turnpike's application to set aside the AD pursuant to s 15(a), (b), (c) and (d) of the CIPAA was premised on: (i) there was clear error of fact and that the decision was improperly procured on the basis of an agreement confirmation which existence was disputed by Turnpike; (ii) the learned adjudicator had failed and/or refused to take cognisance of and/or appreciate Turnpike's contentions and the evidence adduced at the adjudication relating to the variation works amount; (iii) the clarification session allowed by the adjudicator was unnecessary. Unlike Kay Corp, Turnpike was not allowed to present any evidence at the said clarification session. Turnpike was also not allowed to cross-examine; and (iv) the agreement confirmation which the adjudicator had based her decision on was a settlement agreement, which fell outside of the ambit of the CIPAA and therefore

rendering the adjudicator to have acted in excess of her jurisdiction. According to Turnpike the document referred to as the agreement confirmation by Kay Corp never existed in the manner it was shown by Kay Corp as there existed only a document which had proposals but not an agreement as alleged by Kay Corp on the value of the variation works. This document was said to be attached to Kay Corp's letter ('Appendix 9').

Held:

(1) Despite Kay Corp having produced the agreement confirmation right from the beginning of the adjudication proceedings and having all the opportunity given through the process and by the adjudicator including a clarification session, Appendix 9 did not emerge or even made mentioned by Turnpike at any time. Furthermore, there was no evidence which showed that Turnpike had neither challenged the authenticity of the agreement confirmation nor did it deny the preparation of it. Turnpike had failed to prove on a balance of probabilities that Kay Corp had procured the AD by fraudulent means (see paras 21 & 23–24).

(2) The adjudicator had deliberated on all the issues raised by both Turnpike and Kay Corp at the adjudication proceedings at length and had come to her conclusion with regards to the value of the variation works. The adjudicator had provided both parties their opportunities to state their case respectively at the adjudication proceedings and had not left any issues raised at the said proceedings undeliberated. Therefore, Turnpike's allegation that the learned adjudicator had failed and/or refused to take cognisance of and/or appreciate Turnpike's contentions and the evidence adduced at the adjudication relating to the variation works amount and that the adjudicator had denied it the right to be heard was unfounded. Turnpike had failed to discharge its burden to show that the adjudicator had breached the rules of natural justice pursuant to s 15(b) of the CIPAA (see paras 27 & 32).

(3) Turnpike had not adduced any cogent evidence or had made any compelling legal submission justifying the adjudicator's lack of independence or impartiality in arriving to her decision. Turnpike had not discharged the burden of proving the allegation made against the adjudicator under this limb (see paras 37 & 39).

(4) Not at any time during the adjudication proceedings did Turnpike raise any objection against the adjudicator adjudicating the issue pertaining to the agreement confirmation on the basis that this issue was not within her jurisdiction. The adjudicator acted well within her jurisdiction. Therefore, having failed to establish s 15(a), (b), (c) and (d) of the CIPAA against the adjudicator, Turnpike's application to set aside the AD was dismissed with cost of RM5,000 (see paras 42 & 45–46).

(5) Since the setting aside application was dismissed, the application for stay of execution of the AD was accordingly dismissed with no order as to cost (see paras 47–48).

(6) Since the setting aside and the stay of execution of the AD had been dismissed, Kay Corp's application to enforce the AD was allowed with no order as to costs (see para 50).

[Bahasa Malaysia summary

Turnpike Sdn Bhd ('Turnpike') telah melantik Kay Corp Sdn Bhd ('Kay Corp') sebagai kontraktor utama bagi satu projek. Kay Corp telah terlibat dengan Turnpike untuk menjalankan skop kerja khusus berhubung dengan projek itu. Skop kerja kemudiannya diperluaskan untuk memasukkan kerja pengubahan. Sijil perakuan siap kerja telah dikeluarkan dan Kay Corp menyampaikan tuntutan bayaran untuk jumlah RM17,202,421.33. Turnpike telah mempertikaikan jumlah yang dituntut oleh Kay Corp. Disebabkan oleh tuntutan tidak dibayar, Kay Corp telah memulakan prosiding adjudikasi menurut Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP') terhadap Turnpike. Adjudikator memutuskan memihak kepada Kay Corp dalam keputusan adjudikasinya ('KA'). Hasil daripada KA, perkara berikut telah difailkan oleh pihak-pihak: (a) Saman 41 yang difailkan oleh Turnpike terhadap Kay Corp untuk mengetepikan KA dan melalui saman pemula ini, Turnpike telah memfailkan penangguhan pelaksanaan KA; dan (b) Saman 61 yang difailkan oleh Kay Corp untuk perintah mahkamah untuk menguatkuasakan KA. Permohonan Turnpike untuk mengetepikan KA menurut s 15(a), (b), (c) dan (d) APAIP adalah berdasarkan: (i) terdapat kesilapan fakta yang jelas dan bahawa keputusan itu diperoleh secara tidak wajar pada asas pengesahan perjanjian yang kewujudannya dipertikaikan oleh Turnpike; (ii) adjudikator yang bijaksana telah gagal dan/atau enggan mengambil tahu dan/atau menghargai pertikaian Turnpike dan keterangan yang dikemukakan pada adjudikasi berkaitan dengan jumlah kerja perubahan; (iii) sesi penjelasan yang dibenarkan oleh adjudikator adalah tidak diperlukan. Tidak seperti Kay Corp, Turnpike tidak dibenarkan mengemukakan sebarang keterangan pada sesi penjelasan tersebut. Turnpike juga tidak dibenarkan membuat pemeriksaan balas; dan (iv) pengesahan perjanjian yang mana adjudikator telah dasarkan keputusannya adalah perjanjian penyelesaian, yang berada di luar lingkungan APAIP dan oleh itu menyebabkan adjudikator telah bertindak melebihi bidang kuasanya. Menurut Turnpike, dokumen yang disebut sebagai pengesahan perjanjian oleh Kay Corp tidak pernah wujud dalam cara yang ditunjukkan oleh Kay Corp kerana hanya wujud dokumen yang mempunyai cadangan tetapi bukan perjanjian seperti yang didakwa oleh Kay Corp mengenai nilai kerja pengubahan. Dokumen ini dikatakan dilampirkan pada surat Kay Corp ('Lampiran 9').

Diputuskan:

(1) Walaupun Kay Corp telah mengemukakan pengesahan perjanjian sejak awal prosiding adjudikasi dan dengan semua peluang yang diberikan melalui proses dan oleh adjudikator termasuk sesi penjelasan, Lampiran 9 tidak muncul atau disebut oleh Turnpike pada mana-mana masa. Tambahan pula, tiada keterangan yang menunjukkan bahawa Turnpike mencabar kesahihan pengesahan perjanjian dan menafikan penyediaannya. Turnpike telah gagal untuk membuktikan pada keseimbangan kebarangkalian bahawa Kay Corp telah memperoleh KA dengan cara penipuan (lihat perenggan 21 & 23–24).

(2) Adjudikator telah membincangkan semua isu yang dibangkitkan oleh kedua-dua Turnpike dan Kay Corp pada prosiding adjudikasi dengan panjang lebar dan telah membuat kesimpulannya berkenaan dengan nilai kerja pengubahan. Adjudikator telah memberi peluang kepada kedua-dua pihak untuk menyatakan kes masing-masing pada prosiding adjudikasi dan tidak meninggalkan sebarang isu yang dibangkitkan dalam prosiding tersebut tanpa dibincangkan. Oleh itu, dakwaan Turnpike bahawa adjudikator yang bijaksana telah gagal dan/atau enggan mengambil tahu dan/atau menghargai pertikaian Turnpike dan keterangan yang dikemukakan pada adjudikasi yang berkaitan dengan amaun kerja pengubahan dan bahawa adjudikator telah menafikannya hak untuk didengar adalah tidak berasas. Turnpike telah gagal melepaskan bebannya untuk menunjukkan bahawa adjudikator telah melanggar peraturan keadilan semula jadi menurut s 15(b) APAIP (lihat perenggan 27 & 32).

(3) Turnpike tidak mengemukakan apa-apa keterangan yang kukuh atau telah membuat sebarang penghujahan undang-undang yang mendorong yang mewajarkan kekurangan kebebasan atau kesaksamaan adjudikator dalam membuat keputusannya. Turnpike tidak melepaskan beban membuktikan dakwaan yang dibuat terhadap adjudikator di bawah bahagian ini (lihat perenggan 37 & 39).

(4) Tidak pada bila-bila masa semasa prosiding adjudikasi Turnpike membangkitkan apa-apa bantahan terhadap adjudikator yang mengadili isu yang berkaitan dengan pengesahan perjanjian atas dasar bahawa isu ini bukan dalam bidang kuasanya. Adjudikator bertindak dengan baik dalam bidang kuasanya. Oleh itu, setelah gagal membuktikan s 15(a), (b), (c) dan (d) APAIP terhadap adjudikator, permohonan Turnpike untuk mengenepikan KA telah ditolak dengan kos RM5,000 (lihat perenggan 42 & 45–46).

(5) Oleh kerana permohonan mengenepikan telah ditolak, permohonan untuk penangguhan pelaksanaan KA telah ditolak dengan sewajarnya tanpa perintah kos (lihat perenggan 47–48).

(6) Memandangkan pengenepian dan penangguhan pelaksanaan KA telah ditolak, permohonan Kay Corp untuk menguatkuasakan KA telah dibenarkan tanpa perintah kos (lihat perenggan 50).]

Cases referred to

ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal [2016] MLJU 1776; [2016] 1 LNS 1522, CA (refd)

Bertam Development Sdn Bhd v R&C Cergas Teguh Sdn Bhd [2017] MLJU 2276; [2017] 1 LNS 2228, HC (refd)

Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd [2015] MLJU 941; [2015] 8 CLJ 728, HC (refd)

Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd [2016] MLJU 640; [2016] 5 CLJ 882, HC (refd)

Gumi Asli Elektrikal Sdn Bhd v Dazzling Electrical (M) Sdn Bhd and another case [2020] MLJU 314, HC (refd)

Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd [2019] 2 MLJ 362; [2019] 2 CLJ 229, CA (folld)

MRCB Builders Sdn Bhd v Wazam Ventures Sdn Bhd and another case [2020] MLJU 208; [2020] 1 LNS 891, HC (refd)

Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal [2020] 6 MLJ 224; [2019] 8 CLJ 433; [2019] 5 AMR 516, FC (refd)

Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)

Teguh Wiramas Sdn Bhd v Thien Seng Chan Sdn Bhd and another application [2017] MLJU 633; [2017] 1 LNS 619; [2017] 4 AMR 501, HC (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 13, 15, 15(a), (b), (c), (d), 16, 16(1)(a), 25(i), 27, 27(3), 28, 28(1), (2)

Vatsala Ratnasabapathy (with Khong Heng Kai and Sharizah Mohamed Shihab) (Zain & Co) for the plaintiff.

Jason Ng Kau (with Bell Wong Chia Pei) (Jason Ng & Partners) for the defendant.

Sumathi Murugiah JC:

INTRODUCTION

[1] In September 2022, Kay Corp Sdn Bhd ('Kay Corp') had commenced adjudication proceedings pursuant to the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA 2012') against Turnpike Sdn Bhd ('Turnpike') to claim a sum of RM17,202,421.33 as the unpaid sum arising from a construction contract made between them. The adjudicator decided in favour of the Kay Corp in his adjudication decision ('AD').

[2] As a result of the AD, the followings were filed by the parties:

(a) OS No BA-24C-41–05 of 2023 ('Suit 41') was filed by Turnpike against Kay Corp for leave of court to set aside the AD. Via this OS, Turnpike had filed a notice of application for stay of execution of the AD (encl 2); and

(b) OS No BA-24C-61–08 of 2023 ('Suit 61') was filed by Kay Corp for a court order to enforce the AD pursuant to s 28 of the CIPAA 2012.

[3] Since there are two OSs and a notice of application filed in relation to this AD, the parties agreed to having both the OSs and the encl 2 of Suit 41 heard together and for the decision of the same to be delivered together.

BRIEF BACKGROUND

[4] Turnpike had appointed Kay Corp as the main contractor for the project via letter of award dated 26 March 2018 for a project known as the 'Proposed Relocation and Raising of 275kV and 132kV Overhead Transmission Lines at the Proposed Sungai Besi — Ulu Kelang Elevated Expressway (SUKE) from Sg Besi Bound to Ulu Kelang Bound (Location 2)' ('the project').

[5] The project did not span the entire length of the SUKE expressway. Instead, the project involved relocating several overhead transmission pylons and associated powerlines along a certain section of the expressway. Specifically, Kay Corp was to relocate six existing transmission pylons that were in the path of the SUKE expressway's planned alignment.

[6] Kay Corp was engaged by Turnpike to carry out a specific scope of work in relation to the project ('works') for an original contract sum of RM40,750,000 ('original contract sum'). It is undisputed that the scope of works was then expanded to include the following five items of variation works — under variation order Nos 1a, 1b, 2, 3 and 4 ('the variation works'):

(a) VO 1(a) — live line maintenance and resting platform;

(b) VO 1(b) — change ACSR 2X Zebra to ACIR 2X INVAR;

(c) VO 2 — slope protection/ stability at six numbers of pylon locations;

(d) VO 3 — destructive type test for two numbers of monopoles types MP42 and MP43 at Beijing, China; and

(e) VO 4 — supply, install, testing and commissioning of CCTV system.

[7] The final cumulative certified value of the contract including the VOs of RM44,650,113.74 and the ex-gratia payments towards loss and expense of

RM393,914 is RM84,964,263.54 ('final contract sum'). A

[8] The certificate of practical completion was issued don 25 July 2019.

[9] On 25 April 2022, Kay Corp served a payment claim for the sum of RM17,202,421.33 being for: B

(a) RM10,670,494.81 being the uncertified and/or under certification of variation work/work done;

(b) RM50,260 being the claim for loss and expense due to the prolongation of project; and C

(c) RM6,481,666.52 being the interest on all overdue accounts.

[10] Turnpike had disputed the amount claimed by Kay Corp via its payment response and had made a cross claim of RM393.914 which had been paid by Turnpike to Kay Corp in a full and final settlement of Kay Corp's claims for loss and expense, on the basis that Kay Corp had reneged on the settlement of the said claims by seeking additional loss and expense in the said adjudication. D E

ADJUDICATION PROCEEDINGS

[11] Due to non-payment of the payment claim made by Kay Corp, adjudication proceedings was initiated by Kay Corp by issuing a notice of adjudication dated 13 May 2022 and an adjudication claim followed suit on 15 July 2022. Turnpike had served an adjudication response on 27 July 2022 and the same was replied by Kay Corp on 4 August 2022. F

[12] Upon conclusion of the adjudication proceedings, the adjudicator, Tan Swee Im decided in favour of Kay Corp and Turnpike was to pay to Kay Corp within 30 calendar days from the date of the AD as follows: G

(a) a sum of RM6,313,886.26;

(b) interest at the rate of 5% simple interest pa from 11 November 2019 until the date of realisation of the AD; and H

(c) costs of adjudication proceedings in the sum of RM137,357.

[13] Being dissatisfied with the AD, Turnpike had filed to set aside the same and pending this setting aside, a stay of execution of the AD was also filed for which a decision was made by this court on 30 October 2023. Being dissatisfied with this court's decision, Turnpike had filed a notice of appeal. I

A OBJECT CIPAA 2012

[14] The CIPAA 2012 is a creature of the legislation intended to facilitate speedy and regular payments in the construction industry. As cash flow is the utmost important factor in the construction industry, the CIPAA provides interim measures to disputing parties to solve payment issues expeditiously so as not to jeopardise the continuance of the construction contract entered into by them (see *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2020] 6 MLJ 224; [2019] 8 CLJ 433; [2019] 5 AMR 516 (FC); *Bertam Development Sdn Bhd v R&C Cergas Teguh Sdn Bhd* [2017] MLJU 2276; [2017] 1 LNS 2228).

ISSUES

[15] Turnpike's application to set aside the AD pursuant to s 15(a), (b), (c) and (d) of the CIPAA 2012 is premised on the followings:

(a) that there was clear error of fact and that the decision was improperly procured on the basis of a agreement confirmation which existence was disputed by Turnpike;

(b) that the learned adjudicator had failed and/or refused to take cognisance of and/or appreciate Turnpike's contentions and the evidence adduced at the adjudication relating to the variation works amount;

(c) that the clarification session allowed by the adjudicator was unnecessary. Unlike Kay Corp, Turnpike was not allowed to present any evidence at the said clarification session. Turnpike was also not allowed to cross-examine; and

(d) that the agreement confirmation which the adjudicator had based her decision on is a settlement agreement, which falls outside of the ambit of the CIPAA and therefore rendering the adjudicator to have acted in excess of her jurisdiction.

[16] Turnpike's application for a stay of execution of the AD pursuant to s 16 of the CIPAA 2012 is premised as follows:

(a) the pending of this suit ie Suit 41 to set aside the AD pursuant to s 16(1)(a) of the CIPAA 2012;

(b) that there are clear and unequivocal errors in the AD; and

(c) that Kay Corp is financially weak and as such would render the decision of this court should it be in favour of Turnpike in the setting aside application nugatory.

[17] Kay Corp's application to enforce the AD pursuant to s 28 of the

CIPAA 2012 is premised as follows;

(a) that the adjudicated amount is not paid by Turnpike;

(b) that the AD is not set aside or stayed; and

(c) that there is no final determination by arbitration or court.

FINDINGS OF THE COURT

Suit 41 — Setting aside OS (s 15 of the CIPAA 2012)

Section 15(a) of the CIPAA 2012 — Fraud

[18] In addressing the issue of fraud (s 15(a) of the CIPAA 2012), it must be understood that the burden to prove fraud lies on the one who asserts it. Since here, Turnpike had alleged that Kay Corp had improperly procured by way of fraud the AD in its favour, the burden is on Turnpike to prove so on a balance of probabilities (see the Federal Court case of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584, at paras 48–53).

[19] In this case, it is Turnpike's contention that Kay Corp had by way of fraudulent means procured the AD in its favour from the adjudicator for variation works by using a document referred to as the agreement confirmation which carries only Kay Corp's signature and not Turnpike's as well.

[20] According to Turnpike the document referred to as the agreement confirmation by Kay Corp never existed in the manner it was shown by Kay Corp as there exist only a document which has proposals but not an agreement as alleged by Kay Corp on the value of the variation works. This document is said to be attached to Kay Corp's letter dated 26 August 2020 as Appendix 9 ('Appendix 9').

[21] Appendix 9 which contents are similar but not identical to the agreement confirmation is claimed by Turnpike has only emerged at this application as it has been recently found. Now, I find it strange that despite Kay Corp having produced the agreement confirmation right from the beginning of the adjudication proceedings and having all the opportunity given through the process and by the adjudicator including a clarification session, for the entire duration of the adjudication proceedings of almost one year, Appendix 9 did not emerge or even made mentioned by Turnpike at any time. Turnpike could have stopped the adjudication proceedings if it really had thought that Kay Corp was bringing its claims by way of fraudulent means, which clearly it did not (see: *Gumi Asli Elektrikal Sdn Bhd v Dazzling Electrical (M) Sdn Bhd and another case* [2020] MLJU 314).

[22] The adjudicator had on this issue arrived at her findings based on all the documents, evidence and clarification filed at the proceedings and or brought before her:

> 50. However, on the evidence before me I find as a matter of fact, that on the balance of probabilities there was agreement on the valuation of the Variation works in the sum of RM50,964,000.00, arising from the meetings held on 18 July 2019 and 23 July 2019 and the agreement confirmation issued by the Respondent. It is this sum which ought to have been included in the Final Account for Variation works instead of the sum of RM44,650,113.74.
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> 51. It is not disputed that the sum of RM44,650,113.74 included in the Final Account has already been paid by the Respondent and received by the Claimant.
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> 52. Accordingly, I find in favour of the Claimant in the sum of RM6,313,886.26 being the difference between the amount of RM50,964,000.00 which I find as having been agreed, and the amount of RM44,650,113.74 which has been paid to and received by the Claimant.

[23] Furthermore, there is no evidence which shows that Turnpike had neither challenged the authenticity of the agreement confirmation nor did it deny the preparation of the same by it. The only evidence which exist is Turnpike's denial to the agreement of the value of the variation works as claimed by Kay Corp.

[24] In the upshot, it is this court's findings that Turnpike had failed to prove on a balance of probabilities that Kay Corp had procured the AD by fraudulent means.

Section 15(b) of the CIPAA 2012

[25] In examining whether s 15(b) of the CIPAA 2012 ie there has been a denial of natural justice, can be established in order to set aside the AD, I refer to the case of *MRCB Builders Sdn Bhd v Wazam Ventures Sdn Bhd and another case* [2020] MLJU 208; [2020] 1 LNS 891, where Wong Kian Kheong J (as he then was) held that it is sufficient to dislodge a complaint of breach of natural justice if the adjudicator had given just one reason to have arrived to his decision.

[26] The principle of natural justice that is said to have been denied here is the right to being heard, *audi alteram partem*. In an adjudication proceedings, the adjudicator has the duty to accord procedural fairness to the parties during the course of the proceedings whereby the issues raised by both parties are to be considered and a decision is to be derived therefrom. In the case of *ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal* [2016] MLJU 1776; [2016] 1 LNS 1522, the Court of Appeal held:

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> [19] When one speaks of natural justice, it is nothing more than what we call the concept of 'procedural fairness' which needs to be accorded to the parties in a dispute of a hearing.

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[27] In this case, as seen in the AD, the adjudicator had deliberated on all the issues raised by both Turnpike and Kay Corp at the adjudication proceedings at length and had come to her conclusion with regards to the value of the variation works. The adjudicator had provided both parties their opportunities to state their case respectively at the adjudication proceedings and had not left any issues raised at the said proceedings undeliberated. Therefore, Turnpike's allegation that the learned adjudicator had failed and/or refused to take cognisance of and/or appreciate Turnpike's contentions and the evidence adduced at the adjudication relating to the variation works amount and that the adjudicator had denied it the right to be heard is unfounded.

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[28] I refer to the case of *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd* [2015] MLJU 941; [2015] 8 CLJ 728 where it was stated as follows:

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> ... Section 15 has provided limited grounds on which the decision of the adjudicator may be set aside. Since an application under s 15 is not an appeal, the decision of the adjudicator cannot be reviewed on merits.

[29] As such, whether the adjudicator had assessed the issues raised correctly or not is not up to this court to determine as the decision of the adjudicator cannot be reviewed on its merits.

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[30] Furthermore, s 25(i) of the CIPAA 2012 provides the adjudicator the power to inquisitorially take the initiative to ascertain the fact and the law required for the decision. The adjudicator is free to form his opinion independently of both parties and to rely on information which is obtained by her own investigation.

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[31] Since the adjudication proceedings pursuant to the CIPAA 2012 is an interim measure to solve issues related to payments, any errors or omission arising from this proceeding can be remedied via a final determination through arbitration or court as provided for under s 13 of the CIPAA 2012 (see: *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd* [2016] MLJU 640; [2016] 5 CLJ 882).

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[32] Based on the foregoing, Turnpike has failed to discharge its burden to show that the adjudicator has breached the rules of natural justice pursuant to s 15(b) of the CIPAA 2012.

Section 15(c) of the CIPAA 2012

[33] An AD can be set aside if it can be established pursuant to s 15(c) of the CIPAA 2012 if the plaintiff discharges its legal burden that the adjudicator lacked independence or impartiality in conducting the adjudication proceedings and in delivering the AD.

[34] Even though they are generally used synonymously, 'independence' and 'impartiality' are concepts which have distinct differences. In the context of adjudication pursuant to s 15(c) of the CIPAA 2012, lack of independence describes an adjudicator who has prior or existing relationships between himself and any one of the parties at the adjudication proceedings.

[35] In the book, Lam Wai Loon and Ivan YF Loo, *Construction Adjudication in Malaysia* (Chapter 6, para 6.13), the following was stated in defining 'impartiality':

> As stated in Mustill & Boyd Commercial Arbitration (2nd Ed), 'impartiality is the antonym of bias'.
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> Bias can come in many forms. As per Lord Phillips in Re Medicaments and Related Classes of Goods (No 2):
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> > Bias is an attitude of mind which prevents the judge from making an objective determination of the issues that he has to resolve. A judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in may forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issues before him.

[36] In this case, it is Turnpike's contention that the clarification session allowed by the adjudicator was unnecessary and that unlike Kay Corp, Turnpike was not allowed to present any evidence at the said clarification session and was also not allowed to cross examine. As such, the adjudicator has been implicated to lack independence or impartiality in assessing the issues before her.

[37] By the definitions of what constitute 'independence' and 'impartiality' as stated in the foregoing paragraphs, apart from the allegations made against the adjudicator, Turnpike had not adduced any cogent evidence or had made any compelling legal submission justifying the adjudicator's lack of independence or impartiality in arriving to her decision. As mentioned in the above paras dealing with s 15(b) of the CIPAA 2012, the adjudicator had

reasoned out every conclusion that she had reached in deliberating the issues brought before her.

[38] At this juncture, I refer to the High Court case of *Teguh Wiramas Sdn Bhd v Thien Seng Chan Sdn Bhd and another application* [2017] MLJU 633; [2017] 1 LNS 619; [2017] 4 AMR 501 where Lee Swee Seng J (as he then was) held as follows:

> [39] There is also no basis for the respondent to allege that the adjudicator had failed to act independently and impartially. The fact that the adjudicator did not agree with the respondent's position on the law is no proof that he had failed to act independently and impartially. Such an allegation should not be launched without some evidence pointing inexorably to a lack of independence or impartiality in the hearing and the delivery of the adjudication decision.

[39] Therefore, not being the party who the adjudicator was in favour of cannot constitute as evidence to this assertion made against the adjudicator. As such, I am not convinced that the Turnpike has discharged the burden of proving the allegation made against the adjudicator under this limb.

Section 15(d) of the CIPAA 2012

[40] It is Turnpike's contention that the adjudicator had acted in excess of her jurisdiction because she had dealt and based her decision on the agreement confirmation which is akin to a settlement agreement. As such, this does not come within the ambit of the CIPAA 2012 and therefore, the adjudicator had acted in excess of her jurisdiction.

[41] Section 27 of the CIPAA 2012 provides the jurisdictional boundaries in which the adjudicator can act in adjudication proceedings, s 27(3) particularly gives the adjudicator the discretion to proceed and complete the adjudication proceedings notwithstanding any jurisdiction challenge, without prejudice to the rights under ss 15 and 28 accordingly.

[42] In this case, not at any time during the adjudication proceedings did Turnpike raise any objection against the adjudicator adjudicating the issue pertaining to the agreement confirmation on the basis that this issue is not within her jurisdiction. In fact, the only issue which Turnpike had raised a jurisdictional objection against the adjudicator is on the issue pertaining to Kay Corp's claim for loss and expenses.

[43] Be that as it may, the issue pertaining to the value of the variation works is not alien to the construction contract between the parties which comes

within the ambit of the CIPAA 2012. Therefore, it is undeniable that this is an issue which arose from the payment claim by Kay Corp and not one which is independent from it.

[44] Furthermore, s 25(i) of the CIPAA 2012 provides the adjudicator the power to inquisitorially take the initiative to ascertain the fact and the law required for the decision. The adjudicator is free to form her opinion independently of both parties and to rely on information which is obtained by her own investigation.

[45] In my opinion, the adjudicator acted well within her jurisdiction. Since the adjudication proceedings pursuant to the CIPAA 2012 is an interim measure to solve issues related to payments, any errors or omission arising from this proceeding can be remedied via a final determination through arbitration or court as provided for under s 13 of the CIPAA 2012 (see: *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd* [2016] MLJU 640; [2016] 5 CLJ 882).

[46] Therefore, having failed to establish s 15(a), (b), (c) and (d) of the CIPAA 2012 against the adjudicator, Turnpike's application to set aside the AD is hereby dismissed with cost of RM5,000.

Stay of execution — Enclosure 2 in suit 41

[47] Since, the application for stay of execution of the AD was pursuant to s 16(1)(a) of the CIPAA 2012, having decided that the setting aside application is hereby dismissed, there is no longer the need to deliberate on the grounds for which this application was filed in the first place.

[48] Therefore, the application for stay is hereby dismissed accordingly with no order as to cost.

Enforcement OS — Suit 61 (s 28 of the CIPAA 2012)

[49] As guided by Her Ladyship Mary Lim Thiam Suan JCA (as she then was) in the Court of Appeal case of *Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd* [2019] 2 MLJ 362; [2019] 2 CLJ 229, the court may exercise its discretion to grant leave under s 28(1) and (2) of the CIPAA 2012 to enforce an adjudication decision if the following three conditions are met:

(1) the adjudication decision has been made in favour of the party applying for leave under s 28 of the CIPAA

(2) the party against whom an adjudication decision is made, has failed to pay the adjudicated amount on the date specified in the adjudication decision; and

(3) there is no prohibition on the court's discretionary power to grant leave to enforce the adjudication decision.

[50] In this case, all three conditions have been satisfied and since the setting aside and the stay of execution of the AD have been dismissed, Kay Corp's application to enforce the AD is allowed with no order as to costs.

CONCLUSION

[51] Premised on the above evidences and reasons:

(a) both the setting aside OS and notice of application are dismissed;

(b) the enforcement OS is allowed; and

(c) a total cost of RM5,000 subject to allocatur shall be paid by Turnpike to Kay Corp accordingly.

Order accordingly.

Reported by Ahmad Ismail